

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BOB K LUONG,
Plaintiff,
v.

SUPER MICRO COMPUTER, INC., et al.,
Defendants.

Case No. 24-cv-02440-NW

**ORDER DENYING MOTION TO
DISMISS**

Re: ECF No. 42

Plaintiff Bob K. Luong (“Luong” or “Plaintiff”) alleges that his former employer, Defendant Super Micro Computer, Inc. (“Super Micro”), and its CEO, Defendant Charles Liang (“Liang”) (collectively, “Defendants”), unlawfully retaliated against him for being a whistleblower regarding Defendants misleading accounting practices and other misconduct. On January 13, 2025, Defendants moved to dismiss the second amended complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). ECF No. 42. Having considered the parties’ briefs and the relevant legal authority, the Court concludes oral argument is not required, *see* N.D. Cal. Civ. L.R. 7-1(b), and DENIES the motion.

I. BACKGROUND

The Court included many of the relevant facts and references to the record in its November 4, 2024 Order Granting Defendants’ Motion to Compel Arbitration and Stay Action, and does not repeat those facts here. ECF No. 34. In that Order the Court compelled arbitration on Luong’s two state law claims and stayed the case with respect to Luong’s non-arbitrable federal claim for whistleblower retaliation under the Sarbanes-Oxley Act of 2002 (“SOX”). ECF No. 34. Luong then filed a motion for leave to amend his complaint to abandon his state law claims and proceed

only on his SOX claim. ECF No. 35. Pursuant to the parties' stipulation, Luong dismissed his state law claims and on December 16, 2024, he filed a second amended complaint ("SAC") that included only his SOX claim. ECF No. 36; Joint Stipulation and Order, ECF No. 37; SAC, ECF No. 38.

A. The Current Dispute

On April 12, 2023, Luong's counsel faxed a SOX whistleblower retaliation administrative complaint to the Occupational Safety & Health Administration's ("OSHA") Fremont/San Jose State Plan Office. Jordan Decl., Ex. 2 ("April 12, 2023 administrative SOX complaint"). The parties dispute whether this fax was received by OSHA, and if not, what consequences should result.

Luong's April 12, 2023 administrative SOX complaint requests that OSHA investigate his allegation of "unlawful whistleblower retaliation in violation of the Sarbanes-Oxley Act of 2002" against Defendant Super Micro. *Id.* at 1. The April 12, 2023 administrative SOX complaint alleges that Super Micro and Liang "have a well-documented history of prematurely recognizing revenue and understating expenses in violation of Generally Accepted Accounting Principles ('GAAP') and certain antifraud, books and records, and internal accounting controls provisions of the federal securities laws." *Id.* at 1-2. It also asserts that "Mr. Luong resisted and, in some instances, refused to go along with CEO Liang's and Super Micro's schemes, which he reasonably believed violated GAAP and SEC accounting rules." *Id.* at 2. For example, in late 2020 and early 2021, "Luong reported [] concerns regarding the recognition and allocation of revenue issues to CFO Kevin Bauer who met with CEO Liang to discuss these concerns." *Id.* at 4. The April 12, 2023 administrative SOX complaint states that Luong also met with HR personnel and "filed an internal complaint with Super Micro formalizing the concerns he initially raised with HR." *Id.* In his HR complaint Luong reported Defendants retaliated against him and his staff and that retaliation continued until he was placed on involuntary administrative leave on October 14, 2022. *Id.* The SAC states that Luong was later placed on involuntary unpaid administrative leave, then terminated on April 12, 2023. SAC ¶ 37.

1 The SAC further alleges that Luong “timely submitted his administrative SOX
2 Whistleblower Retaliation Complaint to . . . [OSHA] via facsimile within the 180-day statute of
3 limitation period.” *Id.* ¶ 38. Plaintiff’s counsel declares the April 15, 2023 date listed in the SAC
4 is incorrect and should be April 12, 2023. Brooks Decl. ¶ 3. Luong also asserts that “[m]ore than
5 180 days have now passed since Plaintiff’s administrative SOX Whistleblower Retaliation
6 Complaint was filed” and because “[n]o action has been taken on the complaint by OSHA or any
7 other designee of the Secretary of Labor and no final decision has been rendered,” he has
8 exhausted his administrative remedies. SAC ¶ 39.

9 Soon after faxing the April 12, 2023 administrative SOX complaint, Plaintiff’s counsel
10 received an email confirmation from myfax stating “Your fax was successfully sent to
11 15107943889 by MyFax” and listed the date, number of pages, length of transmission, and the ID
12 number of the receiving fax machine. Jordan Decl., Ex. 4 and Pierre Charles Decl. Ex. B
13 (“MyFax confirmation”).

14 In June and July 2024, Defendants’ counsel submitted FOIA requests to OSHA. Jordan
15 Decl., Exs. 5-7. The FOIA responses indicate that OSHA searched its regional Whistleblower
16 Protection Program (“WPP”) records for the April 12, 2023 administrative SOX complaint (listed
17 as the April 15, 2023 SOX complaint) and did not find any records. *Id.*

18 Plaintiff’s counsel submitted its own FOIA request to OSHA in mid-January 2025 after
19 Defendants filed the instant motion. Brooks Decl., Ex. 6. The request specifically sought the
20 “SOX whistleblower complaint my office faxed to the OSHA Fremont/San Jose State Plan Office
21 at (510) 794-3889 on April 12, 2023.” *Id.* OSHA responded as follows:

22 Please be advised FOIA requests apply to Federal government
23 agencies. Federal OSHA can only search for records in its respective
24 offices. State OSHA offices are not Federal OSHA offices. State
25 OSAH [sic] maintain and control their own records, [sic] As you are
requesting a copy of a fax you sent to Cal/OSHA, not Federal OSHA,
Federal OSHA has no records responsive to this FOIA request.

26 *Id.* OSHA’s response then stated “[y]ou may use the information provided below to submit a
27 Public Records Act (aka PRA) request directly to Cal/OSHA.” *Id.* Plaintiff’s counsel then
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submitted a California Public Records Act (“PRA”) request to Cal/OSHA on January 27, 2025. Brooks Decl., Ex. 7.

Also on January 27, 2025, Plaintiff’s counsel sent a hand-delivered letter to OSHA’s Oakland Area Office and via email to the Division of Labor Standards Enforcement. Brooks Decl., Ex. 1. The letter requested “that OSHA equitably toll the 180-day limitation period and accept for filing and investigation” the April 12, 2023 administrative SOX complaint. *Id.* The letter noted that “[o]n April 24, 2024, after not receiving a final decision from OSHA within 180 days of filing the OSHA complaint, Plaintiff filed a civil action in federal court” and attaches the complaint. *Id.*

On February 6, 2025, an investigator from OSHA’s WPP responded to Plaintiff’s January 27, 2025 letter copying Plaintiff’s and Defendants’ counsel. Suppl. RJN, Ex. 8. The February 6, 2025 response stated:

On April 12, 2023, you filed a Sarbanes-Oxley Act (SOX), 18 U.S.C.A. §1514A complaint with the State Plan OSHA Fremont/San Jose office (Cal-OSHA). On April 24, 2024, after waiting over 180 days, you elected to file your claim in U.S. District Court. On January 1, 2025, Respondent filed a motion to dismiss the complaint because Complainant “failed to exhaust his administrative remedies...” Finally, on January 27, 2025, you filed a SOX complaint with the OSHA Whistleblower Protection Program (WPP) in the San Francisco Region requesting equitable tolling of the filing date and approval to “kick-out” the complaint to U.S. District Court.

The Whistleblower Investigations Manual (CPL-02-03-011) provides a no-exclusive list of reasons that may justify tolling. In this instance Chapter 3.III.D.4.d (“*The employee mistakenly filed a timely retaliation complaint relating to a whistleblower statute enforced by OSHA with another agency that does not have the authority to grant individual relief...*”) applies because you timely filed your complaint with Cal-OSHA who does not have authority to grant relief under SOX. Additionally, you waited the required timeframe under the act to “kick-out” your complaint U.S. District Court.

You provided this office a copy of your complaint filed in U.S. District Court on April 24, 2024. As a result of your electing to proceed with your case in court, WPP is dismissing your complaint.

Id. (emphasis in original).

On March 12, 2025, staff counsel at Cal/OSHA responded to Plaintiff’s PRA request stating, “[p]ursuant to your client’s authorization, attached please find the SOX whistleblower

2025. Defs.’ Supp. Brief in Support of Mot. to Dismiss, ECF No. 64 (“Defs.’ Supp. Brief”), Pl.’s Supp. Brief in Opposition to Mot. to Dismiss, ECF No. 65 (“Pl.’s Supp. Brief”).

II. REQUESTS FOR JUDICIAL NOTICE

A court may take judicial notice of facts “not subject to reasonable dispute” because they are either (1) “generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201. Accordingly, “[a] court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment.” *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001)). But a court cannot take judicial notice of disputed facts contained in such public records. *Id.*

Both parties ask the Court to take judicial notice of several documents, outlined below. Defendants request judicial notice of the documents in Table A, whereas Plaintiff requests judicial notice of the documents in Table B. The parties’ objections to any of the documents requested for judicial notices are indicated in each table.

Table A – Defendants’ Requests for Judicial Notice

Document Description	Document Source	Objections
June 20, 2024 email exchange between plaintiff’s and defendants’ counsel regarding plaintiff’s SOX complaint	Jordan Decl., Ex. 1 (ECF No. 43-1)	N/A
June 20, 2024 attachment (Luong April 12, 2023 administrative SOX complaint) to the email exchange between plaintiff’s and defendants’ counsel regarding plaintiff’s SOX complaint	Jordan Decl., Ex. 2 (ECF No. 43-2)	N/A
July 17, 2024 email exchange between plaintiff’s and defendant’s counsel regarding the faxing of plaintiff’s SOX complaint	Jordan Decl., Ex. 3 (ECF No. 43-3) ²	N/A

² It appears Jordan Declaration Exhibits 3 and 4 were not described or referenced in the declaration itself.

Document Description	Document Source	Objections
Email dated April 12, 2023, from myfax.com with the subject line “Successful transmission to 15107943889. Re: UNKNOWN”	Jordan Decl., Ex. 4 (ECF No. 43-4) ³	N/A
OSHA initial response dated June 13, 2024, to FOIA number 2024-F-10317 to K. B. Jordan	Jordan Decl., Ex. 5 (ECF No. 43-5)	“Plaintiff requests that the Court only take judicial notice of the genuineness of the contents” of Jordan Declaration Exhibit 5. Opp’n at 8.
OSHA follow-up response dated June 13, 2024, to FOIA number 2024-F-10317 correcting search dates to K. B. Jordan	Jordan Decl., Ex. 6 (ECF No. 43-6)	“Plaintiff requests that the Court only take judicial notice of the genuineness of the contents” of Jordan Declaration Exhibit 6. Opp’n at 8.
OSHA response dated July 8, 2024, to FOIA number 2024-F-11241 to K. B. Jordan	Jordan Decl., Ex. 7 (ECF No. 43-7)	“Plaintiff requests that the Court only take judicial notice of the genuineness of the contents” of Jordan Declaration Exhibit 7. Opp’n at 8.

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Table B – Plaintiff’s Requests for Judicial Notice

Document Description	Document Source	Objections
January 27, 2025 Letter to OSHA and Division of Labor Standards Enforcement (DLSE) and attaching exhibits 1 through 8	Brooks Decl., Ex. 1 (ECF No. 45-1 ⁴ , pdf pages 4-70)	N/A
OSHA webpage titled “How to File a Whistleblower Complaint” accessed on January 27, 2025	Brooks Decl., Ex. 2 (ECF No. 45-1, pdf pages 71-83)	N/A
Wayback Machine archive of OSHA website from March 15, 20		

plaintiffs.’’ *Erhart v. BofI Holding, Inc.*, 612 F. Supp. 3d 1062, 1087 (S.D. Cal. 2020) (citation omitted).

In the instant case, because the Court finds Luong met SOX’s administrative complaint filing requirements as discussed below, the result is the same under either posture. If Luong’s administrative complaint filing requirements are jurisdictional, then the Court has jurisdiction because it finds Luong met those requirements. If the filing requirements are a non-jurisdictional claim-processing rule, then Defendants’ motion to dismiss for failing to state a claim should be denied.

As an initial matter Defendants maintain that Luong failed to timely file his administrative complaint because it was not received by OSHA. Mot. at 13-14. On its face, the controlling regulation states, “**The date of the** postmark, **facsimile transmittal**, electronic communication transmittal, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office **will be considered the date of filing**.” § 1980.103(d) (emphasis added). Thus, the date of filing, not the date of receipt, determines timeliness.

Here, Luong’s SOX complaint was timely because it was faxed on either April 15, 2023 (per the SAC) or April 12, 2023 (per the judicially noticed exhibits) and Luong waited more than 180 days to file his complaint in federal court on April 24, 2024. Defendants’ legal authority does not dictate a different result. For instance, neither case involved faxed complaints, *see Murray*, 279 F. Supp. 2d 799 and *Bentley*, 414 F. App’x 28, and both were decided under a previous iteration of the operative regulation that stated “if the complaint is filed in person, by hand-delivery or other means, the complaint is filed upon receipt.” 29 C.F.R. § 1980.103 (effective to November 2, 2011).

Because the Court finds Luong timely filed his SOX administrative complaint, it need not address whether the April 12, 2023 administrative SOX complaint should be equitably tolled and the SAC amended.⁸

⁸ Additionally, Defendants assert that Luong failed to comply with the post-filing requirement that “[w]ithin seven days after filing a complaint in federal court, a complainant must file with OSHA, the ALJ, or the ARB, depending on where the proceeding is pending, a copy of the file-stamped

B. Claim Against Defendant Liang

In the alternative, Defendant Liang argues that he should be dismissed from this case because Plaintiff failed to identify Liang, or any retaliatory action by Liang, in Plaintiff's April 12, 2023 administrative SOX complaint. Mot. at 16. Plaintiff asserts that his current federal court SOX claim is reasonably related to the allegations in the April 12, 2023 administrative SOX complaint such that it survives a motion to dismiss. Opp'n at 10.

Neither party cited, nor is the Court aware of, any binding authority addressing this issue. However, the controlling regulations provide that to make a SOX administrative complaint, "[n]o particular form of complaint is required" and complaints "may be filed orally or in writing." 29 C.F.R. § 1980.103(b). "Because of the absence of formal pleading requirements, complaints in OSHA administrative proceedings are not expected to meet the standards of pleading that apply to claims filed in federal court under Rule 12(b)(6)." *Wadler v. Bio-Rad Lab's, Inc.*, 141 F. Supp. 3d 1005, 1020 (N.D. Cal. 2015). Additionally, "administrative pleadings are liberally construed and easily amended." *Donovan v. Royal Logging Co.*, 645 F.2d 822, 826 (9th Cir. 1981). Thus, the *Wadler* court found that "a complaint is sufficient so long as the whistleblower complainants give an opposing party 'fair notice' of the charges against it." *Wadler*, 141 F. Supp. 3d at 1020 (citation omitted).

Yet the *Wadler* court also noted that the test for "fair notice" does not "specifically address the question of what is required to give a particular individual 'fair notice' where only the corporation is expressly named as a respondent in an OSHA administrative action." *Id.* Instead, "Ninth Circuit cases addressing exhaustion requirements under Title VII further support the conclusion that an administrative complaint may, under some circumstances, be sufficient to exhaust a plaintiff's administrative remedies even where a particular defendant is not named as a defendant in any heading or caption." *Id.* at 1021. The Court disagrees with Defendant Liang that Plaintiff's failure to specifically name Liang in Plaintiff's April 12, 2023 administrative SOX

complaint." 29 C.F.R. § 1980.114, *see* Mot. at 15 (citing same). However, Plaintiff later provided his federal complaint to OSHA, mooting Defendants' concern. Brooks Decl. Ex. 1.

complaint dooms Plaintiff's current claim. "To require that an individual defendant be named in the caption of an administrative complaint when no formal pleading (or even written document) is even required under Sarbanes-Oxley is inconsistent with the statutory and regulatory framework established by Congress and the Department of Labor to ensure compliance with Sarbanes-Oxley." *Wadler*, 141 F. Supp. 3d at 1021.

Therefore, the Court looks to the whole of the April 12, 2023 SOX administrative complaint and determines that it gives "fair notice" to Liang of potential claims against him. The administrative complaint directs numerous allegations specifically against Defendant Liang, including that:

- "Super Micro and is CEO, Charles Liang ('CEO Liang') have a well-documented history of prematurely recognizing revenue and understating expenses in violation of Generally Accepted Accounting Principles ("GAAP") and certain antifraud, books and records, and internal accounting controls provisions of the federal securities laws." April 12, 2023 administrative SOX complaint at 1-2.
- "Though Super Micro and CEO Liang appeared to curtail their unlawful activities for a brief period following the SEC enforcement action and was able to get the company relisted on the NASDAQ in January 2020, it did not take long until they began to engage in unlawful accounting activities again." *Id.* at 2.
- "Mr. Luong resisted and, in some instances, refused to go along with CEO Liang's and Super Micro's schemes, which he reasonably believed violated GAAP and SEC accounting rules." *Id.*
- "In December 2020 and January 2021, Mr. Luong reported his concerns regarding the recognition and allocation of revenue issues to CFO Kevin Bauer who met with CEO Liang to discuss these concerns." *Id.* at 4.

Taken together, these allegations are sufficient to give Defendant CEO Liang "fair notice" had OSHA initiated an investigation within the 180-day timeframe to do so.⁹

⁹ Defendant Liang argues that "there is nothing beyond Plaintiff's speculation to suggest that an

